No. 83-233

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

COLORADO RIVER INDIAN TRIBES,
Petitioner,

vs.

GERALD ARANSON, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals correctly conclude that intermittent tribal use of Colorado River waters together with the presence of the river within the outer boundaries of the Colorado River Indian Reservation were circumstances insufficient to prove a "clear and unequivocal" intent by the United States to convey the riverbed to the Indians and thereby deprive the future State of Arizona of its equal footing rights?

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vs.

GERALD ARANSON, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondents Travis, John and Palo Verde Irrigation District[1] hereby submit their brief in opposition to the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 696 F.2d 654 (1983).

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. section 1254(1).

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[1]These Respondent groups include: Gerald Aranson and Jan Furst Aranson, his wife; Blythe Land Properties, a Limited Partnership; Joe B. Finley, individually and as President of Western Cattle Feeders, and Florence S. Finley, his wife; Murray M. Hausner and Leonore Hausner, his wife; Jared C. John, Jr., and Alice

STATUTORY PROVISIONS INVOLVED

Act of Admission of the State of California, 9 Stat. 452 (1850):

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of California shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

Act of March 3, 1865, 13 Stat. 541, 559:

> All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, contain-

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B. John, his wife; Edward Meltzer and Frieda A. Meltzer, his wife; Arthur Ourieff and Verni Ourieff, his wife; Jack M. Ostrow; Prima Rosa Land and Cattle Company, A Partnership; Arthur I. Berman; Martin A. Levy; Western Cattle Feeders, a California corporation; Rancho Del Juan, Inc., an Arizona corporation; Neil John, individually and as President of Rancho Del Juan, Inc.; C. P. Richins and Sons, a Partnership; Charles P. Richins, Jr. and Agnes Richins, his wife; Norman E. Richins and Winifred Richins, his wife; Lawrence D. Richins, individually and as President of Sunrise Farms and as President of Riverview Farm and Tillage Company, and Barbara Richins, his wife; Riverview Farm and Cattle Company, a Partnership; Arnold M. Travis and Joan D. Travis, his wife; Riverview Land Company, a California corporation; C. P. Richins, individually and as President of Riverview Land Company; Sunrise Farms, a California corporation; Harry B. Swerdlow; Travis Farms, a Partnership; Joe B. Finley, Jr. and Mary C. Finley, his wife; R. W. Bilbo and Kathryn S. Bilbo, his wife; Arizona Farmers Production Credit Association; Bank of America National Trust and Savings Association; Desert Ginning Company, Inc., an Arizona corporation; Blythe Feed Yards, a Partnership; The Federal Land Bank of Berkeley; Riverview Farm and Tillage Company, a California corporation; Northwestern Mutual Life Insurance Company; Los Angeles Period Furniture Company, Inc.; and Julius Fligelman, individually and as President of Los Angeles Period Furniture Company, Inc.

ing about seventy-five thousand acres of land shall be set apart for an Indian reservation for the Indians of said river and its tributaries.

Proclamation of Arizona Statehood, 37 Stat. 1728 (1912):

NOW THEREFORE, I, WILLIAM HOWARD TAFT, President of the United States of America, . . . declare and proclaim the fact that the fundamental conditions imposed by Congress on the State of Arizona to entitle that State to admission have been ratified and accepted, and that the admission of the State into the Union on an equal footing with the other States is now complete.

STATEMENT OF THE CASE

In 1865, Congress established the Colorado River Indian Reservation by setting aside "all that part of the public domain in the territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River . . . ." Act of March 3, 1865, 13 Stat. 541, 559. The reservation was created from a portion of the periodically flooded "bottom land"[2] bounding the eastern bank of the

[2] "Bottom land" refers to lands bordering the Colorado River which are periodically flooded. It does not include the bed of the river. For example, the 1864 Annual Report of the Commissioner of Indian Affairs (hereinafter referred to as Annual Report for the year designated), H.R. Exec. Doc. No. 1, 38th Cong., 2d Sess. 147 (U.S. Serial Set Vol. No. 1220) (incorporating the report of Adophus F. Waldemar, May 30, 1864) states:

> "At your request I have made an examination of the lands on the east bank of the Colorado River from La Paz to Corner Rock.
>
> I have been surprised at the great quantity of rich bottom land and alluvial soil, transversed by many sloughs and lagunas, which extend from the banks of the river for several miles into the valley."

Id. at 303. See also 1866 Annual Report, H.R. Exec. Doc. No. 1, 39th Cong., 2d Sess. 1, 108 (U.S. Serial Set Vol. No. 1284) ("cattle . . . are now being grazed on the Colorado bottoms"); *id.* at 111 ("flooding all the bottom lands on either side of the river"); 1870

Colorado River. The bottom land on the western bank of the river, part of which was sold to respondents' predecessors in interest by the State of California in the 1870's, was swamp and overflowed land which belonged to the State of California.[3]

Although the 1865 Act neither mentions the riverbed nor specifies the exact location of the western boundary of the reservation, little doubt exists that the boundary was the eastern bank of the Colorado River.[4] The western half of the riverbed was already owned by California under the equal footing doctrine.[5] Moreover, the "public domain" from which the reservation was created did not include

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Annual Report, H.R. Exec. Doc. No. 1, Part 4, 41st Cong., 3d Sess. 467, 594 (U.S. Serial Set Vol. No. 1449) ("bottom land along the river"); 1882 Annual Report, H.R. Exec. Doc. No. 1, 47th Cong., 2d Sess. 1, 61 (U.S. Serial Set Vol. No. 2100) ("the bottom land on either side of said river").

[3]The United States granted California all swamp and overflowed lands within the State as of September 28, 1850. Swamp Land Act, ch. 84, 9 Stat. 519 (1850) (codified as amended at 43 U.S.C. §§ 981-994); *Wright v. Rosenberry*, 121 U.S. 488 (1877); *Heath v. Wallace*, 138 U.S. 573 (1891). California could convey the lands into private ownership as of September 28, 1850, because the Act was considered a present grant of lands. *Wright v. Rosenberry*, 121 U.S. at 488.

[4]The legislative history and the Reports of the Commissioners of Indian Affairs during that period indicate that the reservation was to be located on the banks of the Colorado River. Debate on Act of March 3, 1865, *supra* note 2, at 321 ("they will have a resting-place and a home on the banks of the river"); 1864 Annual Report, *supra* note 2, at 301 ("on the bank of the Colorado river"); 1873 Annual Report, H.R. Exec. Doc. No. 1, Part 5, 43rd Cong., 1st Sess. 371, 652 ("all the bottom-land between the river and the edge of the mesa"). See also 1864 Annual Report, *supra* note 2, at 303; 1866 Annual Report, *supra* note 2, at 109; 1870 Annual Report, *supra* note 2, at 592. Memorial of the [Territorial] Legislature of Arizona, H. R. Misc. Doc. No. 16, 38th Cong., 2d Sess. (1865).

[5]When California acquired statehood, it received the western half of the bed of the Colorado River under the equal footing doctrine. Act of Admission of the State of California, ch. 50, 9 Stat. 452

the bed of the navigable Colorado River. ***Borax Consolidated v. City of Los Angeles***, 296 U.S. 10, 17 (1935).

Congress established the reservation in an attempt to eliminate the frequent crop failures suffered by the Indians when the Colorado River failed to flood its banks.[6] Historically, the Indians residing on the "bottom lands" bordering the river had relied upon the river overflows as the source of water for their crops in much the same way that the Egyptians used the annual flooding of the Nile, that is, by planting crops in the floodplain following the recession of the annual floods of the river.[7] Overflows were unreliable, however, and crop failures occurred during the frequent periods of drought. Thus, when Congress created the reservation in 1865, it appropriated funds to finance construction of an irrigation canal which was to provide water on a more regular basis.[8]

(1850); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1971).

[6]The 1864 Commissioner of Indian Affairs recommended that Congress:

> "select a reservation for them on the bank of the Colorado River, and ask the government to aid them in opening an irrigating canal, so that they may become industrious and self-sustaining."

1864 Annual Report, *supra* note 2, at 301. *Accord,* Debate on Act of March 3, 1865, *supra* note 2, at 1320-1322.

[7]1864 Annual Report, *supra* note 2, at 295. Contrary to petitioner's suggestion that the Tribes employed irrigation for crop production prior to creation of the reservation, the Indians did not rely upon irrigation through artificial diversion of Colorado River water, but rather, depended upon the natural periodic flooding of the "bottom lands."

[8]Act of March 2, 1867, ch. 173, 14 Stat. 492; Act of July 27, 1868, ch. 248, 15 Stat. 198; Act of May 29, 1872, ch. 233, 17 Stat. 165.

Intrusion of squatters onto reservation lands and concern that the "bottom lands" originally included within the reservation were insufficient to provide crops adequate to support the Indians[9] led President Grant to expand the reservation by three executive orders in 1873,[10] 1874,[11] and 1876.[12] The third order extended the western boundary of the reservation into California north of the land now owned by respondents. With respect to the lands involved here, the Executive Order described the west boundary as "the west bank of the Colorado River." Although petitioner pins its case on this language, the order could not have been intended as a grant of any portion of the riverbed. By 1876, the west half of the riverbed from the center line to the western bank had been vested in the State of California for more than 25 years. The reports of the Commissioners

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[9]1871 Annual Report, H. R. Exec. Doc. No. 1, 42d Cong., 2d Sess. 417, 766 (U.S. Serial Set. Vol. No. 1505); 1873 Annual Report, *supra* note 4, at 652.

[10]Executive Order of November 22, 1873, *reprinted in* 1 C. Kappler, *Indian Affairs Laws and Treaties* 803 (2d ed. 1904).

[11]Executive Order of November 16, 1874, *reprinted* in Kappler, *supra* note 11. The second expansion added, for the first time, lands in the State of California on the western side of the Colorado River but in no way suggested that the riverbed was to be included in the reservation.

> Beginning at a point where the La Paz Arroyo enters the Colorado River, four miles above Ehrenberg . . . thence in a northwesterly direction across the Colorado River to the top of Monument Peak, in the State of California; thence south westerly in a straight line to the top of Riverside Mountain, California; thence in a southeasterly direction to the point of beginning, be, and the same is hereby, withdrawn from sale and set apart as the reservation for the Indians of the Colorado River and its tributaries.

[12]Executive Order of May 15, 1876, *reprinted in* Kappler, *supra* note 11, at 804.

of Indian Affairs during the period that followed verify that the reservation included the "bottom land" along the *banks* of the river.[13]

Respondents' land is involved in this case because the bed of Colorado River moved to the west and split into two channels following completion of the Laguna Dam (located downstream from the Palo Verde Valley) in 1909. The result was to place the disputed property largely on the eastern or Arizona side of the river. The change in the river's location gave rise to petitioner's claim that the western boundary of the reservation (which petitioner contends included the bed of the river) moved westward with the river and encompassed the land purchased years earlier by respondents' predecessors in interest.

The river returned to its approximate historic location with construction of a cut-off channel by the Palo Verde Mutual Water Company (with the authority of the United States Department of the Interior) in 1920. Thus, when respondents purchased the land in dispute in 1939, the property was located west of the Colorado River well within California. The land was never occupied by the Indians and was never part of the reservation under any

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[13]For example, the 1879 Annual Report describes the reservation as: "extend[ing] for 75 miles north and south, divided in the center by the Colorado River. . . ." H. R. Exec. Doc. No. 1, 46th Cong., 2d Sess. 69, 109 (U.S. Serial Set Vol. No. 1910). Likewise, the 1882 Annual Report notes that the reservation "embraces within its limits all, or nearly all, of the bottom land on *either side of the river*." 1882 Annual Report, *supra* note 2, at 61 (emphasis added). To the same effect is the 1885 Annual Report where the reservation is described as: "contain[ing] 128,000 acres of land, situated principally on the east side of the Colorado River, *extending along its banks* from a short distance below La Paz to a point nearly opposite Monument Peak, California, a distance of about 70 miles." H. R. Exec. Doc. No. 1, 49th Cong., 1st Sess. 3, 227 (U.S. Serial Set Vol. No. 2379) (emphasis added).

theory except that, due to a temporary shift in the river channel, the land was located east of the river for some time between 1909 and 1920.

On July 17, 1972, after more than 100 years of silence, the Indians commenced this action (through the United States in its capacity as trustee for the tribe) seeking to quiet title to those lands situated on the California side of the present channel and east of the median line of the 1919 channel. The Indians sought to eject respondent record owners of the property together with the Palo Verde Irrigation District and the State of California. By the time petitioner commenced this action, respondents Travis and Johns had expended more than $2,000,000 purchasing and improving the lands at issue.

For reasons that are wholly unexplained, the State of Arizona was not named as a party and was not joined. This is all the more surprising since Arizona's claim to the riverbed is substantial.

On February 11, 1977, following a six-day court trial, the district court entered a judgment quieting title to all lands east of the midline of the 1919 channel in the United States as owner in trust for the Colorado River Indian Tribes. In addition, the district court quieted title to the the western half of the 1919 channel in California, ejected respondents from the lands in question, and assessed respondents back rent for their use of the property.[14]

Respondents appealed to the Ninth Circuit Court of Appeals, citing, *inter alia*, error in determining that the Indians received title to the eastern half of the riverbed. California did not appeal and the judgment of the trial

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[14]The court did off-set the value of good-faith improvements against back rent.

court has become final as to the State of California.[11] The Court of Appeals affirmed the district court in a decision issued on March 30, 1981. That decision failed to consider *Montana v. United States*, 450 U.S. 544 (1981), decided by this Court six days earlier. Upon respondents' petition for reconsideration, the Court of Appeals withdrew its decision and ordered rebriefing and additional oral argument on the *Montana* issue. The State of Arizona appeared for the first time in all of these proceedings in July, 1981, when it intervened shortly before the reargument of the case following withdrawal of the original decision.

On January 10, 1983, the Court of Appeals issued the decision from which the petitioner seeks review. *United States v. Aranson*, 696 F.2d 654 (1983). The 1983 Opinion reversed the district court and held that the evidence was insufficient to establish that the government had intended to convey the eastern half of the riverbed to the Indians when it formed the reservation. *Id.* at 666. The Court of Appeals remanded the matter for retrial on the issues of the "aboriginal title and the correct boundary of the reservation." *Id.* The aboriginal title issue was raised for the first time by the Indians during supplemental briefing following withdrawal of the original decision.

REASONS FOR DENYING THE WRIT

I. This Case Is Not Procedurally Ripe for Supreme Court Review

A. Arizona Was an Omitted Indispensable Party Before the Trial Court

This case is not ripe for review. Petitioner is seeking to quiet title to the bed of the Colorado River. The State of

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[11] California's status in the case is unusual. That state was awarded the western half of the 1919 channel by the district court (upon a judgment stipulated to by the United States). Neither the petitioner nor California appealed, and therefore, that judgment is presumably final. In it's petition, however, petitioner seems to be asserting aboriginal title to the entire riverbed, including California's half.

Arizona is a competing claimant because of the presumption that it took title to the east half of the riverbed upon its admission to the Union in 1912. Despite its interest in the property, Arizona was not a party to the proceedings in the trial court, and only belatedly appeared in the appellate proceedings. Petitioner is asking this Court to divest Arizona of sovereign claims based upon a trial record of proceedings in which Arizona was neither a party nor a participant.

Arizona's claim makes it, without question, an indispensable party in this litigation. *California v. Arizona*, 440 U.S. 59, 62 (1979).[16] Until Arizona has had an opportunity to litigate its interests, this cause is not ripe.

B. The Tribes' Claim of Aboriginal Title to the Disputed Lands Has Yet to Be Tried

The Court of Appeals remanded this case to the district court for further proceedings on an issue which Petitioner raised for the first time on appeal. That issue is whether the tribes enjoy any aboriginal title to the disputed lands. 696 F.2d at 666. While respondents maintain there is no merit to the aboriginal-title claim,[17] nevertheless its rais-

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[16]See also *McShan v. Sherrill*, 283 F.2d 462 (9th Cir. 1960); *Stewart v. United States*, 242 F.2d 49 (5th Cir. 1957); *Fouke v. Schenewerk*, 197 F.2d 234 (5th Cir. 1952); *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir., 1974); 3A J. Moore and J. Lucas, *Moore's Federal Practice* ¶ 19.09[1] 19-198-19-200 (1982).

The recent Ninth Circuit decision in *Puyallup Indian Tribe v. Port of Tacoma*, No. 81-3480, August 15, 1983, is at odds with earlier decisions of the same circuit concerning indispensability of party claimants to real property and, in respondent's view, is in error.

[17]Any claim to land in California based upon aboriginal title was extinguished in 1853 under the California Land Claims Act, ch. 41, 9 Stat. 631 (1851), which required that claims be presented by March 3, 1853. *Barker v. Harvey*, 181 U.S. 481 (1901); *U.S. v. Title*

ing—and the remand for proceedings on the question—demonstrate that the case is tendered to this Court in a posture far from final. As a purely practical consideration, should petitioner prevail on its new theory of aboriginal title, its cause for seeking review here would be made moot. Too, as mentioned above, the State of Arizona is yet to be heard on its claim of title to the east half of the riverbed. This claim will likewise be adjudicated when the matter is heard by the district court.

"[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. R.*, 389 U.S. 327, 328 (1967). A lack of finality such as inheres in the present case is "of itself . . . sufficient ground for the denial" of the petition for writ of certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1915). See also *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893). *Cf.* the recent decision in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 633 (1980) (jurisdiction predicated on section 1257 of Title 28, United States Code, not on section 1254 (1)).

Insurance and Trust Co., 265 U.S. 472 (1924). Aboriginal title to land in Arizona and Nevada was extinguished on March 3, 1865, when the Colorado River Indian Reservation was created.

Petitioner has already litigated the issue of Mohave aboriginal title and has already been paid for its claims existing prior to the extinguishment dates. In *Mohave Indians Who Are Members of the Colorado River Indian Tribes v. United States*, 31 Ind. Cl. Comm. 425 (1973), the Indian Claims Commission entered a final judgment (based upon a compromise settlement between the tribes and the federal government) awarding compensation to the Indians according to the fair market value of the Mohave's aboriginal title lands in California as of the March 3, 1853 date of extinguishment, and in Arizona and Nevada as of the March 3, 1865 date of extinguishment.

II. The Court of Appeals Correctly Applied Montana v. United States, 450 U.S. 544 (1981), to the Facts Presented Here

The Court of Appeals found the proper resolution of this matter to be as elusive as the Colorado River itself with regard to the respective rights of the parties flowing from the many and varied physical movements of the river. Nevertheless, following this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), it had little difficulty correctly concluding that neither Congress nor the President, in creating and modifying the boundaries of the Colorado River Indian Reservation, manifested an intent to deprive Arizona of its sovereign right to the eastern half of the bed of the Colorado River.

Montana v. United States reaffirmed petitioner's need to prove that the U.S. government intended to convey the riverbed when it created the Indian reservation. Stressing the "strong presumption against conveyance by the United States," *Montana* held that the presumption cannot be overcome "unless the intention [of the United States to convey the riverbed] was definitely declared or otherwise made plain" or "was rendered in 'clear and special words.'" 450 U.S. 552. The mere fact that the bed of a navigable waterbody lies within the perimeter boundaries described in the treaty, legislation or executive order creating the reservation is not sufficient expression of intent. *Id.* at 554. The existence of a "public exigency" may be pertinent in ascertaining the intent of the United States, but the intent to convey the riverbed must still be clear and unequivocal. *Id.* at 554.

In applying the *Montana* analysis to the facts of this case (and in the absence of any findings by the district court on these questions), the Court of Appeals concluded that "even the strongest language in the various official documents defining the reservation's western boundary"

failed to manifest a specific intent to convey the riverbed. 696 F.2d at 664. The appellate court further found that the Indians' use of the river was not enough to justify inferring such intent on the part of the United States, and that the "considerable scholarly documentation"[15] submitted failed to indicate that sufficient "public exigency" existed at the time of the grant to compel Congress to depart from the equal footing doctrine. 696 F.2d at 666.

Petitioner's quarrel with the decision of the Court of Appeals is primarily a disagreement with the factual determinations of that court. Naturally, petitioner would like this Court to review the evidence and resolve the facts another way. However, this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1924). An examination of factual issues (even if we are to assume that there was such evidence before the Court of Appeals which could be examined) is not an appropriate task for this Court. *See* Sup. Ct. R. 17; *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1917) (holding that a writ of certiorari was improvidently granted because the issue "depended essentially upon an appreciation of the evidence").

In any event, nothing concerning the creation of the Colorado River Indian Reservation approaches the unusual circumstances in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), and *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), where an intent to convey the beds of navigable waterways was found. In *Choctaw Nation*, the Choctaw and Cherokee Indians had been forced to move from Georgia and Mississippi to Arkansas Territory, and then again to what is now Oklahoma, in order to make way for American settlers. Certain Indians refused to move

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[15]None of the so-called "scholarly documentation" was ever offered as evidence at trial, but was submitted for the first time by petitioner during reargument before the Ninth Circuit.

voluntarily and the U.S. Army had to be brought in to forcibly remove them. Peace was maintained only upon assurances by the government that the Indians would have complete sovereignty over their new lands and that "no part of the land granted to them shall ever be embraced in any territory or State." Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-34; Treaty of New Echota, December 29, 1835, 7 Stat. 478. In light of this history, and of the plainness of the government's covenant, this Court found that the government intended to convey the bed of the river to the Indians and not to reserve it for the future state. 397 U.S. at 635.

No similar covenant was made with the Indians of the Colorado River; they were neither forced from their native lands nor compelled to settle on the reservation. Moreover, unlike the tribes in *Choctaw*, the Colorado River Indian Tribes received only the customary right of use and occupancy[19] rather than the far stronger ownership interest of an entire region in fee simple. 397 U.S. at 626, 638. Petitioner's reliance on *Choctaw Nation* ignores these fatal distinctions. *See Montana*, 450 U.S. 555, n. 5 (discussing the peculiar circumstances justifying the *Choctaw* decision).

Likewise, the decision in *Alaska Pacific Fisheries* was based upon facts wholly unparrallel to those in the present case. The Metlakahtla Indians, who had historically depended upon fishing for their survival, emigrated from their homeland to the Annette Islands at the urging of the U.S. government. Congress then established a reservation for them, which comprised the Annette Islands and the navigable waters between the islands. Following their removal to the Annettes, they not only continued to fish but also developed a commercial fishery upon which they grew dependent. Alaska Pacific Fisheries thereafter erected a

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[19]1872 Annual Report, H.R. Exec. Doc. 1, Part 5, 42d Cong., 3d Sess. 391, 470 (U.S. Serial Set Vol. No. 1560).

massive fish trap in reservation waters which was so effective that it materially reduced the catch available to the Indians. In this action to remove the fish trap, the question presented was the status of the waters and submerged land. This Court observed that ownership of the fishing grounds adjacent to the islands was essential to the Indians' survival, that Congress was fully aware of this fact when it created the reservation, and that Congress had thus clearly intended the reservation to include the fisheries. 248 U.S. at 98.

By contrast, ownership of the riverbed was never essential to the survival of the Colorado River Indian Tribes. Primarily an agricultural people, the tribes were dependent on the river as a source of flood water for their crops and an occasional source of fish to supplement their diet. Under the Winters Doctrine established by this court in 1908,[20] and subsequent litigation,[21] the Indians have been assured of sufficient water for irrigation. Their ability to fish is similarly guaranteed.[22] The Indians' right to fish and

[20] *Winters v. United States*, 207 U.S. 564 (1908).

[21] This Court in *Arizona v. California*, 373 U.S. 546 (1963), and in subsequent decisions relative to that same litigation (*Arizona v. California*, 376 U.S. 340 (1964); *Arizona v. California*, 439 U.S. 419 (1979); *Arizona v. California*, 51 U.S.L.W. 4325 (U.S. Mar. 30, 1983) (No. 8 Orig.)) has guaranteed petitioner tribes water for irrigation and other purposes associated with the Colorado River Indian Reservation. Likewise, the continued regulatory authority of Congress over the navigable Colorado River under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 401-466, and the Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376, assures the Indians access to the river and use of the river waters for boating, fishing, bathing and a host of other purposes. The same rights are likewise guaranteed through the public trust doctrine which, as a matter of state law, provides the public with extensive use of navigable waters. (*See People v. California Fish Co.*, 166 Cal. 576, 138 p. 79 (1913); *State v. Superior Court* (*Lyon*), 29 Cal.3d 210, 625 p. 2d 239, 172 Cal.Rptr. 696, *cert. denied*, 454 U.S. 865 (1981); *State v. Superior Court* (*Fogerty*), 29 Cal.3d 240, 625 p. 2d 256, 172 Cal.Rptr. 713, *cert. denied*, 454 U.S. 865 (1981).

[22] *Id.*

irrigate is not the least bit diminished because the bed of the river may be the sovereign land of either California or Arizona. Surely, petitioner is not suggesting that it could not take water or fish from the west half of the river because it became the sovereign land of California in 1850. That would be an absurdity. The Indians used the west half of the river just as extensively as the east half—if they used either at all—and their ability to do so had nothing to do with ownership of the riverbed. The Court of Appeals correctly concluded that the facts surrounding the creation of the reservation did not rise to the level of the unique circumstances present in *Choctaw Nation* and *Alaska Pacific Fisheries*.

III. Petitioner Is Asking This Court to Reconsider Its Recent Decision in Montana v. United States, 450 U.S. 544 (1981), an Invitation This Court Should Not Accept

Stripped of its surplusage, petitioner argues that when a reservation is created which incorporates a navigable waterbody within its perimeter boundaries and when water from the waterway has been used by the Indians, the reservation will include the bed of the navigable waterway. This result would have the effect of placing most—if not all—navigable waters within reservation boundaries in the ownership of the tribes, thereby rendering *Montana*, and the long line of authorities of which it is only the most recent example, a nullity.

If use of the Colorado River water and the existence of fish as a part of the diet is sufficient to establish the intent of United States to deprive a state of its sovereign lands, there is not a navigable stream or lake in the west that was not conveyed as a part of any reservation in which they may be found. It is difficult to conceive of a situation in the arid portions of this country where use of river water for domestic purposes, crop raising or fishing would not be

present. Nor, for that matter, is it unusual that a tribe would settle near a large waterbody such as the Colorado River. On the contrary, it would be surprising if they settled anywhere else.

Montana v. United States is representative of principles that this Court has consistently recognized since it first affirmed, in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), that the beds of navigable waterbodies are held in trust by the United States for future states and that, upon admission into the Union, the beds become sovereign lands of the states. As noted in *Shively v. Bowlby*, 152 US. 1 (1894), this trust obligation is not easily defeated. To depart from these well-recognized principles, as petitioner now urges, and to change the rules decades or even centuries after the fact—thereby divesting the states and the states' successors in interest of lands long since considered to be sovereign—is unwarranted and unnecessary.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

October 14, 1983

Respectfully submitted.

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